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**IN THE  
Supreme Court of the United States**

**October Term, 1984**

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**THE MOUNTAIN STATES TELEPHONE  
AND TELEGRAPH COMPANY,  
*Petitioner,***

**v.**

**PUEBLO OF SANTA ANA,  
*Respondent.***

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

---

**MOTION OF PUBLIC SERVICE COMPANY OF  
NEW MEXICO FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE AND AMICUS BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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Pursuant to Rule 36.1 of the Rules for the United States Supreme Court, Public Service Company of New Mexico ("PNM") respectfully moves the Court for leave to file a brief *amicus curiae* in the above entitled cause. Counsel for petitioner, Mountain States Telephone and Telegraph Company, has consented to the filing of this *amicus* brief. Counsel for respondent, Pueblo of Santa Ana, advised counsel for PNM in August 1984 that respondent con-

sented to the filing of this brief; however, on September 6, 1984, counsel for respondent retracted that consent.

PNM is a public utility organized under the laws of the State of New Mexico and is primarily engaged in the generation, transmission and sale of electricity to consumers in New Mexico. The question presented in the instant case is of substantial importance to PNM because it has acquired a number of rights-of-way for electric transmission lines across the lands of various New Mexico Pueblos. PNM's interest, which is more fully set forth in the attached Brief in Support of Petition for Writ Certiorari, is based upon the substantial and potentially far-reaching ramifications of the Tenth Circuit's decision on rights-of-way that PNM and other utilities have utilized across Pueblo lands for five or more decades. PNM is also concerned that this Court should be aware that a decision here may substantially undermine the relationship between New Mexico Pueblos and those with whom they conduct business.

For the reasons set forth herein and in PNM's Brief in Support of Petition for Writ of Certiorari, PNM respectfully requests this opportunity to present its views on the instant case to this Court and urges the Court to grant its Motion for leave to file the accompanying *amicus* brief in support of the Petition.

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**BRIEF OF PUBLIC SERVICE COMPANY OF NEW MEXICO,  
AMICUS CURIAE, IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
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*Amicus Curiae*, Public Service Company of New Mexico ("PNM"), submits this Brief in Support of the Petition for Writ of Certiorari filed by Mountain States Telephone and Telegraph Company ("Mountain Bell"). Mountain Bell has consented to the filing of this brief. The Pueblo of Santa Ana initially consented thereto, but subsequently retracted that consent. Accordingly, PNM has submitted a motion for leave to file this brief pursuant to Rule 36.1 of the Rules for the United States Supreme Court.

PNM respectfully submits that a Writ of Certiorari should be granted to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in the captioned cause on May 14, 1984.

**INTEREST OF PUBLIC SERVICE COMPANY  
OF NEW MEXICO**

PNM is a New Mexico corporation, primarily engaged in the generation, transmission and sale of electricity to over half a million consumers in New Mexico. PNM serves the major metropolitan areas of central and north-central New Mexico. Its service area surrounds and includes several Pueblos. In the sixty miles between the metropolitan areas of Santa Fe and Albuquerque, PNM provides electric service to the residents of the Pueblos of Cochiti, Santa Domingo, San Felipe, Santa Ana and Sandia. To the south of Albuquerque, PNM provides electric service to smaller New Mexico cities and to the Pueblo of Isleta. PNM must utilize rights-of-way for its electric transmission lines to provide economical electric service to its customers. As a practical matter, PNM's power lines must cross Pueblo

lands and PNM has therefore over the years acquired a number of rights-of-way across the lands of various New Mexico Pueblos.

Briefly stated, the primary question presented for review is whether the Tenth Circuit's holding—that rights-of-way conveyed by Pueblo Indians pursuant to Section 17 of the Pueblo Lands Act (*Act of June 7, 1924*, 43 Stat. 636) are invalid—is proper. PNM's interest is predicated upon the potentially severe consequences a decision in this case may have on the delivery of electricity to Indian and non-Indian consumers in New Mexico and on the rights-of-way it has obtained and utilized across Pueblo lands for half a century or longer. PNM believes this Court should be aware of the ramifications of the decision below to PNM, and other utilities, which must utilize rights-of-way across Pueblo lands to deliver essential public services. For these reasons, PNM is presenting its concerns regarding this case and apprising the Court that the opinion sought to be reviewed will have an impact upon persons other than the parties to this action.

In the early decades of this century, PNM acquired several rights-of-way across Pueblo lands pursuant to Section 17 of the Pueblo Lands Act ("Section 17"). These rights-of-way were for a limited term of fifty years and are not inconsistent with other uses of Pueblo lands, including grazing and agriculture. Litigation is presently pending in the United States District Court for the District of New Mexico wherein the legality of six of the rights-of-way PNM utilizes across Pueblo lands is being challenged: *Pueblo of Isleta v. Albuquerque Gas and Electric Company and Public Service Company of New Mexico* (U.S. District Court No. CIV 82-1535 C) (the "Isleta Lawsuit"); and *United States of America on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santa Domingo v. Public Service Company of New Mexico* (U.S. District Court No. CIV 82-1483 C) (the "Pueblos Lawsuit"). These cases have been stayed by Order of United States District Judge Santiago Campos pending the final outcome on appeal of the instant case.

**ISLETA LAWSUIT.** In the Isleta Lawsuit, the Isleta Pueblo challenges the validity of a right-of-way PNM is utilizing across the Pueblo. Isleta Pueblo asserts that this right-of-way is void because it was conveyed pursuant to Section 17 without separate congressional approval. In obtaining this right-of-way Albuquerque Gas and Electric Company ("AG&E"), the name by which PNM was formerly known, complied with the law as it was interpreted by the Department of the Interior, the agency charged with regulating certain transactions affecting Pueblo lands.

Isleta Pueblo agreed to convey the right-of-way to AG&E. Granting of this right-of-way was approved by the Governor and Lieutenant Governor of Isleta Pueblo, by six other members of the Pueblo and by the attorney for the Pueblo. The Superintendent of the United Pueblos of New Mexico, under whose jurisdiction Isleta Pueblo fell, also approved the right-of-way agreement and recommended its approval to the Secretary of the Interior. The Secretary approved the grant in October 1936. The Pueblo received valuable consideration for the right-of-way and has benefited from its existence. AG&E built a power line on the right-of-way thus acquired. PNM has openly and notoriously utilized the right-of-way for forty-six years in reliance on the Department of the Interior's reasonable interpretation of Section 17. The Pueblo did not contest the validity of this right-of-way until 1982, when it filed suit relying on the District Court's decision in the captioned cause.

Now, after nearly fifty years, the Pueblo alleges that Section 17 requires more than approval by the Pueblo, by the United Pueblos Superintendent and the Secretary of the Interior for the right-of-way to be granted; that the right-of-way is invalid and that therefore PNM has been trespassing upon its land since 1936. The decision in the instant case may determine the outcome of the Isleta Lawsuit.



**PUEBLOS LAWSUIT.** In the Pueblos Lawsuit, the United States sued on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana, and Santa Domingo alleging that six rights-of-way across Pueblo lands are invalid because they were obtained pursuant to Section 17. (One of the rights-of-way at issue in this case is identical to the one at issue in the Isleta Lawsuit.) The rights-of-way being challenged were granted to AG&E in 1926, 1928 and 1936. AG&E complied with the law as it was interpreted by the Department of the Interior in obtaining these rights-of-way.

Again, AG&E entered into agreements with the various Pueblos to obtain the rights-of-way and the same were approved by the Secretary of the Interior. The Pueblos received valuable consideration and benefited from the existence of these rights-of-way. PNM utilized these rights-of-way for at least five decades on the reasonable, and until recently, unquestioned, assumption that the federal agency charged with regulating Pueblo lands had properly interpreted and applied the law.

In addition to the rights-of-way at issue in the two cases discussed above, PNM may have other rights-of-way for electric transmission lines which were obtained pursuant to Section 17. The outcome of the instant action may affect the validity of these rights-of-way. It may also determine whether PNM will be subjected to additional lawsuits by the Pueblos seeking PNM's ejectment from these rights-of-way and trespass damages. Because the decision in this case will affect broad interests throughout the State of New Mexico and because the decision of the Tenth Circuit misinterprets Section 17, PNM respectfully prays that this Court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

## ARGUMENT AND SUMMARY OF ARGUMENT

### **A WRIT OF CERTIORARI SHOULD ISSUE TO SETTLE A QUESTION THAT HAS NOT HERETOFORE BEEN CONSIDERED BY THIS COURT AS TO THE CONSTRUCTION OF SECTION 17 OF THE PUEBLO LANDS ACT.**

The Writ of Certiorari here requested should be granted to consider whether Section 17 allowed Pueblo Indians, with secretarial approval, to convey rights-of-way to non-Indians. It is the position of the petitioner, Mountain Bell, and this *amicus*, that the decision below incorrectly construes Section 17 to invalidate such conveyances and over fifty years of administrative practice. The decision therefore disrupts relationships between the Pueblos and persons conducting business with them. PNM will not here reiterate in detail the arguments presented to this Court in Mountain Bell's Petition. PNM, with the consent of Mountain Bell, joins in and supports Mountain Bell's arguments regarding the construction and interpretation of Section 17.

To summarize, it is the position of PNM that this Court should review the decision of the Tenth Circuit for the reasons outlined below.

#### **A. THE DECISION IS CONTRARY TO THE EXPRESS LANGUAGE OF SECTION 17 OF THE PUEBLO LANDS ACT.**

Section 17 of the Pueblo Lands Act provides, among other things, that "no sale, grant or lease of any character or other conveyance of lands . . . made by any Pueblo . . . shall be of any validity . . . unless the same be first approved by the Secretary of the Interior." The Tenth Circuit found that no sale, grant or lease made by any Pueblo after enactment of the Pueblo Lands Act was valid, even though such conveyance was approved by the Secretary of the Interior pursuant to Section 17. The Tenth Circuit interpreted the Act to require additional action by Congress before the Pueblos were empowered to make convey-

ances. Unless or until Congress acted, said the Tenth Circuit, the Pueblos were incompetent to convey any interest in their lands. Such an interpretation ignores the express language of the Act. It also ignores established rules of statutory construction in that it renders the second clause of Section 17 a nullity. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975). A Writ of Certiorari therefore should issue to review the construction given Section 17 by the Court of Appeals.

**B. THE DECISION IS AT ODDS WITH THE REASONS FOR WHICH CONGRESS ENACTED THE PUEBLO LANDS ACT.**

At the time the Pueblo Lands Act was passed, it was understood that Pueblo Indians had the power to convey land with secretarial approval. 1923 Senate Hearings 72-73, 154-155, 229; 1923 House Hearings, 40-41. See also, *United States v. Candelaria*, 271 U.S. 432 (1926). The Tenth Circuit read the Pueblo Lands Act to strip the Pueblo Indians of this vested power. This power would not be restored to the Pueblo Indians until such time as Congress enacted further legislation providing specific avenues of conveyance. Such a conclusion is illogical in light of the reasons for which Congress enacted the Pueblo Lands Act. 1923 Senate Hearings, 72-73, 154-155. By the Pueblo Lands Act, Congress intended to settle the confusion surrounding title to Pueblo lands which resulted from the decisions in *United States v. Joseph*, 94 U.S. 614 (1877) and *United States v. Sandoval*, 321 U.S. 28 (1913). Nowhere in the Congressional Record relating to the passage of this Act is there an indication that it was intended to deprive the Pueblos of their ability, with secretarial approval, to alienate their land.

This Court should issue its Writ to decide whether the Pueblo Lands Act stripped the Pueblos of their power to make conveyances absent a subsequent Act of Congress.

**C. THE DECISION CONFLICTS WITH THE REASONABLE INTERPRETATION GIVEN THE PUEBLO LANDS ACT BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT.**

The Pueblo Lands Act was contemporaneously interpreted to allow Pueblo Indians to make conveyances with secretarial approval and without a subsequent Act of Congress. See, F. Cohen, *Handbook of Federal Indian Law*, at 104 (1942). This contemporaneous interpretation of the Act is amply evidenced by the right-of-way at issue in the instant case and by the six rights-of-way at issue in the above-referenced litigation against PNM. The Tenth Circuit's decision directly contravenes the administrative interpretation given Section 17 by the Department of the Interior. This interpretation should be given deference. See, *Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974); and *Patterson v. Lamb*, 329 U.S. 539, 541 (1974). This Court should therefore issue its Writ to restore the reasonable interpretation given the Pueblo Lands Act by the Department of the Interior.

**D. THE DECISION CONDEMNS PUEBLO CONVEYANCES MADE WITH SECRETARIAL APPROVAL AND THEREFORE IS IN CONTRAVENTION OF PREVIOUS DECISIONS OF THIS COURT RESPECTING THE INDIAN NON-INTERCOURSE ACT.**

The Indian Non-Intercourse Act (Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. §177), and its predecessor enactments, were not intended to prohibit alienation of Indian land. See, F. Cohen, *Handbook of Federal Indian Law*, *supra*, at 323. Rather, the Act was intended to allow alienation with governmental approval. *Id.* Section 17 met this condition by requiring approval by the Secretary of the Interior before Pueblo conveyances were valid. The Tenth Circuit's opinion, that secretarial approval is insufficient to validate Pueblo conveyances, is at odds with this Court's interpretation of the Indian Non-Intercourse Act and its predecessors as enunciated in *Johnson v. M'Intosh*, 8 Wheat. 543 (1823); and *Mitchel v. United*



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States, 9 Pet. 711 (1835). These cases recognized the inherent power of Indians to alienate their land so long as governmental approval was obtained. A Writ of Certiorari should issue to resolve this conflict between the Tenth Circuit's opinion and the previous decisions of this Court.

### CONCLUSION

For the reasons stated herein and in Mountain Bell's Petition for Writ of Certiorari, PNM respectfully prays that a Writ of Certiorari issue to review the May 14, 1984, opinion of the United States Court of Appeals for the Tenth Circuit. PNM also prays that, upon consideration of the merits, this Court reverse the Tenth Circuit's decision and find that Section 17 of the Pueblo Lands Act authorized the Pueblo Indians, with approval of the Secretary of the Interior, to grant rights-of-way across their lands to non-Indians.

Respectfully submitted,

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### PROOF OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Public Service Company of New Mexico, *amicus curiae* herein, hereby certifies that on 12 September, 1984, pursuant to Rule 33 of the Rules for the United States Supreme Court, service of the Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* Public Service Company of New Mexico in Support of Petition for Writ of Certiorari was made upon:

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and

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by depositing three correct copies of same in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to Counsel of Record listed above.

All parties required to be served have been served.  
DATED: 12 September, 1984.

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